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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

STEVEDORING SERVICES OF AMERICA
and
EAGLE PACIFIC INSURANCE COMPANY,

Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. Department of Labor, and CHARLES SPROULL,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

Contrary to respondent Sproull's argument, the Court of Appeals did not limit its deference to the Director's views to the "penalty on interest" issue stated in Question 3 of the petition for certiorari

Respondent Sproull argues that the Court of Appeals deferred to the statutory interpretation of respondent Director, Office of Workers' Compensation Programs (OWCP), only with respect to the issue petitioners state in Question 3 of their petition for certiorari. (Sproull Br., at 5) That is not what the Court of Appeals said. It prefaced its determination of the issues by saying:

> . . . We give no special deference to the Board's interpretations of the LHWCA, but do defer to the Director's interpretations. (Citation omitted) Although we respect the Board's reasonable interpretations, the 'distinction in the deference owed the Director and the Board is significant . . . where their positions conflict with respect to the issues raised on appeal. (Citation omitted) (Pet. App. A-4)

The Ninth Circuit should be taken at its word. The fact that the Court *repeated* itself concerning deference only with

respect to the "penalty on interest" issue does not mean that it did not defer to the Director's views on the other issues as well.

The respondents have failed to demonstrate the absence of an intercircuit conflict with respect to Question 1, the inclusion of Sproull's post-injury vacation pay in the calculation of his average weekly wage, nor have they reconciled that holding with the settled interpretation of 33 USC § 910(c)

Both respondents argue that the Court of Appeals' decision does not conflict with the decisions of any other judicial Circuit, because the decisions on which petitioners rely, unlike this case, involved "post-injury earnings." (Sproull Br., at 5-6; Dir. Br., at 8)[1] However, the assumption underlying that argument is unsupported by the record. Sproull would not have received any vacation pay at all if his union's collective bargaining agreement with his employers did not provide for it. (*See* Pet., at 3-4) Respondents err when they consider the benefit and ignore its source.

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[1] *See Walker v. Washington Metro. Area Transit Authority*, 793 F2d 319, 322-23 (D C Cir. 1986), *cert. denied*, 479 US 1094 (1987); *Tri-State Terminals v. Jesse*, 596 F2d 752, 753-54 (7th Cir. 1979).

The collective bargaining agreement is the "contract of hiring in force at the time of the injury" under § 2(13) of the LHWCA, 33 USC § 902(13), the definition of "wages." (*See* Br., at 8 n 5) The terms of the agreement cannot be ignored. Under them, Sproull earned his vacation before his injury. He earned his vacation *pay* after his injury, when he received it.

The Director minimizes the importance of 33 USC § 910(c). (Dir. Br., at 8-9) That amounts to tacit recognition that his position is weak, because the Court of Appeals purported to base its decision on § 910(c), even though it did not attempt to reconcile its holding with the settled understanding of the term "earning capacity" as it is used in that subsection. (Pet. App. A-6 - A-7) The controlling statute, like the controlling contract, cannot be ignored.

Finally, Sproull seeks to avoid the broad implications of the Ninth Circuit's decision. He argues that the decision will only affect Pacific Coast longshoremen who are injured between January 1 and April 7 of any given year. (Sproull Br., at 7) If correct, his point would dramatically underscore petitioners' argument that the Court of Appeals has introduced a serious and impermissible lack of uniformity into the nationwide LHWCA workers' compensation system. However, his point is not correct. As Sproull describes vacation pay, "Longshore workers on the Pacific Coast earn vacation pay based on their work hours in a calendar year."

(Sproull Br., at 3) Thus, registered Pacific Coast longshoremen *always* accrue hours toward their next year's paid vacation by working, regardless of the date of injury. The Court of Appeals' decision in Sproull's claim applies with equal force to every other longshoreman who works under his union's collective bargaining agreement.

The "inflation adjustment" accepted by the Court of Appeals cannot be reconciled with the plain language of 33 USC § 908(h) on the facts of this claim; Question 2 is appropriate for review

The operation of what Sproull and the Director beguilingly describe as a "common denominator" or "constant dollars" is not in dispute. (*See* Sproull Br., at 8-9; Dir. Br., at 9) As Sproull puts it, "before a court determines a claimant's fair and reasonable post-injury wage earning capacity, it must use comparable pre and post-injury wage rates." (Sproull Br., at 10-11)

Congress thought differently: the worker's *actual earnings* are the measure of his or her post-injury wage-earning capacity *if* they "fairly and reasonably" represent it. Congress did not say that collectively bargained wage increases -- which Sproull and the Director equate with "inflation" -- must be factored out before "actual earnings" can be compared with the worker's average weekly wage

under 33 USC § 908(h). Certainly, such adjustments *may* be proper, in a proper case, but the LHWCA does not require them, *a priori*, in every case.

Sproull's invocation of the First Circuit's decision in *White v. Bath Iron Works Corp.*, 812 F2d 33 (1st Cir. 1987), illustrates petitioners' point. There, the court used the example of a worker whose post-injury hours declined by half, but whose wages remained the same because of an hourly wage increase. 812 F2d, at 35. *That is not Sproull's case.* He remained fully employed. In fact, his hours increased when he went to the day shift after his injury. (Pet. App. D-2, D-5)[2] For that reason, the collectively bargained wage increases are irrelevant to the determination of Sproull's post-injury wage-earning capacity. The point is easily demonstrated.

Assume that two longshoremen, Sproull and "X," both decide to switch from night shift jobs aboard ships to lighter day shift jobs on the dock, giving up "extra" lines jobs in the process. Assume Sproull's and "X"'s hours and earnings were

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[2] The Board was mindful of the administrative law judge's finding that Sproull's higher post-injury earnings did not fairly and reasonably represent his wage-earning capacity when it stated that he "implicitly" found that Sproull's actual earnings were "representative" of his wage-earning capacity. The Board's point was that *even in such a case*, an "inflation" adjustment is proper. (Pet. App. C-17) The Board erred, as petitioners have shown. The issue is one of law, not fact: it concerns the legal sufficiency and effect of findings of fact, made on an undisputed record.

the same before they made the change, and remain the same -- *and higher* -- after they make the change, but that "X" changes shifts simply for the sake of change, and because he has seniority, not because he was injured. No one could seriously argue that "X" is losing wages: his hours *and* his earnings have increased. If Sproull, like "X," remains fully engaged in *stable* and *suitable* employment, 33 USC § 908(h) requires use of his "actual earnings" for the statutory comparison with his average weekly wage. The references to a "common denominator" and "constant dollars" ignore the clear terms of 33 USC § 908(h), under which stability and suitability of post-injury employment are the overarching considerations. When employment is suitable and stable, Congress has determined that actual earnings are the best guide to determining wage-earning capacity when injured workers return to the job. (*See* Pet., at 19-20)[3]

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[3] Sproull and the Director cite the Court's decision in *Metropolitan Stevedore Co. v. Rambo*, 515 US ---, 115 S Ct 2144, 2150, 132 L Ed 2d 226 (1995), as suggesting that an "inflation adjustment" is proper. (Sproull Br., at 10; Dir. Br., at 10) The point was not at issue in *Rambo*, so the Court's summary of the findings below is not controlling. However, the Court granted certiorari a second time in *Rambo* by an order dated November 27, 1996, the same day petitioners filed their petition for certiorari. *Metropolitan Stevedore Co. v. Rambo*, 519 US ---, 117 S Ct 504 (No. 96-272 (*Rambo II*). Oral argument is scheduled for March 17, 1997. The decision in *Rambo II* may affect this case, because the Court will have to consider 33 USC § 908(h) in determining whether "nominal," or *de minimis*, compensation awards are authorized by § 22 of the LHWCA, 33 USC § 922. The Director's argument in this case appears to be inconsistent

(continued...)

Sproull argues that petitioners have not challenged the administrative law judge's alternative finding that he "lost" about 15 percent of his pre-injury jobs. (Sproull Br., at 11) The Court of Appeals did not consider that issue, and it was not urged as a ground for affirming the compensation order. In any event, Sproull's argument is contradicted by § 8(c)(21) of the LHWCA, 33 USC § 908(c)(21), under which the basis of comparison is "the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise." It is not "the amount the employee would have earned in his or her pre-injury job but for the injury."

Finally, both respondents argue that review is inappropriate with respect to Question 2 because there is no conflict between the judicial Circuits. However, the Court granted certiorari in *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 US 624 (1983), and *Estate of Cowart v. Nicklos Drilling Co.*, 505 US 469 (1992), in the absence of a conflict. The Ninth Circuit's decision affects a large number of LHWCA claims. Review is appropriate.

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[3] (...continued)
with his position in *Rambo II*, where he acknowledges that a compensation claimant's actual post-injury earnings are generally the measure of wage-earning capacity under 33 USC § 908(h). (*See* Dir. *Rambo II* Br., at 17)

The respondents have not identified any policy reasons that are sufficient under the *Newport News* test to justify judicial amendment of the definition of "compensation"; the Court of Appeals' deference to the Director's litigating position requires reversal on Question 3

The Director challenges the Court to apply the rule limiting "liberal construction" of the LHWCA that it approved in *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 US ---, 115 S Ct 1278, 1288, 131 L Ed 2d 160 (1995).[4] The statutory definition of "compensation," 33 USC § 902(12), does not include interest. The rationale for reading the definition as if it did is derived from the supposed inadequacy of the remedy Congress provided for nonpayment of benefits that do not fall within Congress' definition of "compensation," 33 USC § 921(d), and from petitioners' acknowledgment that awards of pre-award interest are proper. (Dir. Br., at 12) The Director does not

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[4] Sproull misunderstands petitioners' position in this Court and misrepresents their position below. Petitioners do not argue that interest may not be awarded on past-due compensation under the LHWCA, as the Director correctly understands. (Dir. Br., at 12) Sproull quotes one paragraph from a three-page discussion in petitioners' opening brief in the Ninth Circuit without quoting petitioners' statement of the standard of review on the "penalty on interest" question: "This issue is reviewable as a question of law. The Court owes no deference to the Director's views. See pages 31-34, above." (Pet. Br., at 37)

attempt to explain how his expanded definition of "compensation" is "essential to operation of [the LHWCA] scheme." *See Newport News, supra*, 115 S Ct, at 1288.

Sproull raises the specter of delay, ignoring the fact that petitioners paid the interest awarded to him in July 1989. (Pet. App. E-2) An employer who delayed paying interest as Sproull suggests would pay interest *on* the accrued interest, so there appears to be no incentive to delay. *See Brown v. Alabama Dry Dock & Shipbuilding Corp.*, 28 Ben. Rev. Bd. Serv. (MB) 160, 164-65 (1994).

The Director goes even farther afield, relying on the Court's decision in *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 US ---, 115 S Ct 2091, 2095-96, 132 L Ed 2d 148 (1995), an admiralty case, for support. However, the Court did not look to the LHWCA as authority for the proposition cited, and no federal statute defines the term "compensation" for cases arising under the general maritime law.

Perhaps recognizing the significance of his repudiation of the order entered by his district administrator, the Director's defense of the Ninth Circuit's avowed deference to his litigating position, contrary to the holdings of four other Circuits, is quite weak. He can only argue that under *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 US 837, 842-

43 (1984), interpretations of the LHWCA, "at least if embodied in a regulation," are entitled to deference. (Dir. Br., at 11 n 8) The Court has put it more strongly: deferential *Chevron* review applies *only* to regulations "promulgated pursuant to congressional authority." *Adams Fruit Co. v. Barrett*, 494 US 638, 649 (1990), *citing NLRB v. Food and Commercial Workers*, 484 US 112, 123 (1987).[5]

The Ninth Circuit's error in deferring to the Director's litigating position made a difference: the Court *said* it did. That error, and the consequent acceptance of an outlandish construction of the LHWCA merit review and reversal.

Respectfully submitted,

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[5] The Director does not respond to petitioners' discussion of *Martin v. OSHRC*, 499 US 144 (1991), *see* Pet., at 22-24, possibly because the Court's very recent decision in *Ingalls Shipbuilding v. Director, OWCP*, --- US ---, --- S Ct ---, --- L Ed 2d --, 1997 WL 63114 (Feb, 18, 1997), reads *Martin* more narrowly than the Director has read it. 1997 WL 64114, at *12.